In the

Supreme Court of the United States.

October Term, 1940.

No.

THE COLUMBIAN NATIONAL LIFE INSURANCE COMPANY,
Petitioner,

v.

LENA M. RODGERS,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Statement.

In applying for the policy in suit the insured truthfully stated that he had outstanding policies in two other companies. He further stated that he had never been rejected by any other company. This second statement was a conscious falsehood, entitling the company to rescind. Decision on first appeal, 93 F. (2d) 740. The material evidence on this point was by deposition and was identical at both trials.

On all the affirmative testimony the defendant did not know that this representation was untrue (R. 82-85; 95).

The defendant did, however, possess a card furnished by the M.I.B. (the Medical Information Bureau). This card indicated that the insured had applied to "some other company, which company had created a certain record against him. The number of the card would not mean that he had been rejected; it would mean that he had had some sort of a history; it might be a rejection and it might not . . . *this number does not indicate in any way what action the company took on the applicant's application*" (R. 83). The number indicated "that there had been some general criticism of the man previously by another company" (R. 84), but in no way disclosed the extent of the criticism or how seriously it affected the risk. The reporting company may have issued the policy exactly as applied for (R. 61, 83), and as a matter of fact *the insured orally told the company that it had done so* (R. 95).

On this evidence the Circuit Court of Appeals ruled that the existence of the M.I.B. record "put the insurer on inquiry . . . because the reporting service . . . indicated that the applicant had either been declined or had been rated differently from the established rates, or that some other unusual circumstances were involved" (R. 118). In so far as this quotation may exceed what is stated in the preceding paragraph it is a conclusion by the court unsupported in the Record.

Argument.

1. UNDER THE UNIFORM KANSAS LAW THERE IS NO DUTY OF INQUIRY INTO FRAUD UNLESS THE TRUTH OF THE STATEMENTS APPEARS "UNREASONABLE AND IMPROBABLE."

No suggestion was made by the court below, and none could be made, that the defendant, in believing the statements in the application, was in the position of having re-

lied, in the light of all its actual knowledge, upon an "unreasonable and improbable" statement. In view of the extent of the information contained in the M.I.B. card, even apart from the insured's oral statement, there was *no inconsistency whatever* between the fact that a previous company had created a record against the applicant and his statement that he had two existing policies and had never been modified or rejected. On the contrary, it was *entirely consistent.* The court ruled, however, that "unusual circumstances" were involved, and because the defendant might have made further inquiry to test the applicant's truthfulness, it "is charged with notice of what the inquiry would have disclosed" and is "equitably estopped . . . from asserting the defense of fraud in the application" (R. 118). The only "unusual circumstances" were merely that some "general criticism" had been made by another company which, for all that appeared, may have issued the policy exactly as applied for. *And the applicant orally told the agent that he had in fact received the policy from that particular company* (R. 95). On this record the court below ruled that the defendant had a *duty of inquiry* to see if the applicant had told the truth, and was equitably estopped.

Equitable estoppel is like any other equitable principle. The Kansas cases are uniform to the effect that it is a defense not open to one who was himself guilty of fraud.

See *Vaughn* v. *Hixon,* 50 Kan. 773, 775; 32 Pac. 358, 359.

Dangerfield v. *Ry. Co.,* 62 Kan. 85, 88; 61 Pac. 405, 406.

The insured here has been ruled guilty of a deliberate, conscious and material falsehood. The beneficiary stands in his shoes. Decision on first appeal, 93 F. (2d) 740. If

the defendant went ahead actually knowing of the falsehood it could of course not now assert that defense. That would be inequitable.

It is not so bound, however, on any basis of constructive knowledge. As against deliberate falsehood by the insured and negligence of the insurer (if there were such) in not inquiring, the equities are entirely the other way.

> "It is not just that a man who has deceived another should be permitted to say to him, 'You ought not to have believed or trusted me,' or 'You were yourself guilty of negligence.' "
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> *Speed* v. *Hollingsworth,* 54 Kan. 436, 440; 38 Pac. 496, 498.
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> *Murray* v. *Davies,* 77 Kan. 767; 94 Pac. 283.
> *Priest* v. *Kansas City Life Ins. Co.,* 116 Kan. 421; 227 Pac. 538.

Even if a party actually goes upon real estate and could, by looking around, see that he was being defrauded, he is not estopped if he buys without investigating (*Murray* v. *Davies,* supra). Or if an insurance company examines an applicant, and could, by due care, learn that his health was not as represented, it is not estopped if it fails to exercise such care and issues the policy (*Priest* v. *Kansas City Life Ins. Co.,* supra).

The Kansas rule is that there is *no duty of inquiry* in the face of a positive and deliberate misrepresentation unless the circumstances are "so improbable or unreasonable" as to give the other party "cause to suspect that it is false."

> *Harvester Co.* v. *Hardware Co.,* 101 Kan. 488, 493; 167 Pac. 1057, 1059.

Information entirely consistent with the absolute truth of the representation obviously reveals nothing improbable or unreasonable whatever.*

The Circuit Court of Appeals cited no one of these Kansas cases. Instead it purported to rely upon the following decisions:

Armourdale State Bank v. *Homeland Ins. Co.*, 134 Kan. 245; 5 P. (2d) 786.
Bowland v. *McDowell*, 132 Kan. 820; 297 Pac. 691.
Stanley v. *Belt Automobile Indemnity Ass'n*, 112 Kan. 412; 210 Pac. 1096.
Dunlap v. *Denison*, 83 Kan. 757; 112 Pac. 598.
Mangum v. *Stadel*, 76 Kan. 764; 92 Pac. 1093.
Maelzer v. *Swan*, 75 Kan. 496; 89 Pac. 1037.
Stadel v. *Aikins*, 65 Kan. 82; 68 Pac. 1088.

Not one of these cases involves a conscious misrepresentation. A majority of them involve the familiar bona fide purchaser situation, where between two innocent parties the one who could be said to be negligent because of constructive knowledge will fail. The other cases are examples of what raises constructive knowledge. None of them holds, or even intimates, that such equitable doctrines are available to protect a wrongdoer from the consequences of his fraud. Indeed the Kansas Court has expressly stated that the two situations are *entirely different*, and that in deciding the law applicable to one the other line of cases is "*perfectly obviously . . . of no consequence.*"

Smith v. *Rector*, 135 Kan. 326, 329; 10 P. (2d) 1077, 1079.

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*See, e.g., *Jefferson Standard Life Ins. Co.* v. *Stevenson*, (CCA-5) 70 F. (2d) 72.

Equitable estoppel is not to be applied in favor of fraud.

> "One practicing a deceit upon the other party is not entitled to invoke the equitable rule in his favor."
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> *Dangerfield* v. *Ry. Co.*, 62 Kan. 85, 88; 61 Pac. 405, 406.

> "The law of constructive notice can never be so applied as to relieve a party from responsibility for actual misstatements and frauds."
>
> *Harvester Co.* v. *Hardware Co.*, 101 Kan. 488, 490; 167 Pac. 1057, 1058.

The Circuit Court of Appeals in refusing to accept this distinction as expressly laid down by the Kansas Court itself has refused to follow the Kansas law just as clearly as if it had purported to rely upon Kansas cases expressly overruled, or has tried to guess that the Kansas law would change. The Kansas cases which are clearly and unambiguously pertinent hold just the opposite of what the court below has decided.

2. THE COURT HELD AGAINST THE DEFENDANT ON A MATTER REQUIRED TO BE, BUT NOT, PLEADED, AND AS TO WHICH THE DEFENDANT HAD NO WARNING.

At the same time that the court below refused to apply the pertinent Kansas substantive law it refused as to procedure to apply the Kansas law, the previous law of its own court, the Federal Rules and the federal law.

In elaborate and detailed pleading, both by petition and reply, the plaintiff claimed that the defendant had full and complete knowledge "of all the facts . . . and was not misled in any way whatsoever" (R. 10, 24). This presented a

perfectly square issue, because if the defendant knew the facts it had not, and could not claim to have, relied on the misrepresentation. Testimony on this issue was taken by the plaintiff by oral depositions in Boston. Even after these depositions were taken, the plaintiff in a lengthy opening simply repeated his claim that the evidence would show that the defendant "with full knowledge of all these things issued the policy" (R. 44). At the argument, some weeks after the evidence was closed (R. 25, 33), the plaintiff raised for the first time the contention that the Boston depositions, if they did not show knowledge, showed an opportunity of obtaining knowledge, and that the defendant was estopped by reason of an unfulfilled duty to investigate. The defendant immediately moved to reopen the depositions, but its motion was denied upon the plaintiff's objection (R. 31). The case has now been decided against the defendant on that single issue. The defendant has never presented its defense, and has been manifestly prejudiced, unless for some reason it has been remiss. Although argued on the original argument (R. 122), and on the motion for rehearing (R. 122), the matter was never adverted to by the court below. A case almost squarely in point is that court's own decision in *Hunter Milling Co.* v. *Koch,* (CCA-10) 82 F. (2d) 735.

Under the Kansas law, if material, waiver and estoppel are affirmative matters.

Cottom v. *Ins. Co.,* 65 Kan. 511; 70 Pac. 357.

Rule 8(c) of the Federal District Court Rules provides, in part:

> "(c) Affirmative Defenses. In pleading to a preceding pleading, a party shall set forth affirmatively . . . estoppel . . . waiver, and any other matter constituting an avoidance or affirmative defense."

The exception sometimes referred to that these matters need not be pleaded when there is no further opportunity to plead does not apply here because the plaintiff did in fact file a reply, setting up waiver and estoppel, but basing it on the claim that the defendant "knew the facts connected with all matters claimed to have been misrepresented before issuing the policy" (R. 24).

The rule requiring waiver to be pleaded equally requires it to be proved in the fashion that it is alleged.

> *Hunter Milling Co.* v. *Koch,* supra (alleged waiver based on correspondence cannot be proved by subsequent oral conversations defendant has not opportunity to meet).

A claim that the defendant had full knowledge and therefore cannot be heard to say that it relied upon misrepresentations is obviously entirely different from the claim that the defendant should have investigated, and therefore should not have relied. The first is met simply by showing that the defendant did not in fact know and did rely—which is what the defendant sought to prove in meeting the Boston depositions. The other is obviously not met by such evidence, but is on the contrary predicated upon it. The defendant, therefore, when this new claim was made after the evidence was closed and when the right to reopen the evidence was denied to it, was left helpless and unprotected.

> "Allegations and proofs must agree, the court can consider only what is put in issue by the pleadings, averments without proofs and proofs without averments are alike unavailing."
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> *Washington R.R.* v. *Bradleys,* 10 Wall. 299, 303.

> "It is well settled that in federal courts a plaintiff can recover only on the allegations of his pleadings and

cannot recover on some other act incidentally appearing in the proof."

Southern Ry. Co. v. *Montgomery,* (CCA-5) 46 F. (2d) 990.

Accord with *Montgomery* case:

Union Pac. R. Co. v. *Garner,* (CCA-8) 24 F. (2d) 53.

Horvath v. *McCord Radiator & Mfg. Co.,* (CCA-6) 100 F. (2d) 326.

Carpenter v. *Baltimore & O. R. Co.,* (CCA-6) 109 F. (2d) 375.

See also *U.S. Fid. & G. Co.* v. *Dye,* (CCA-9) 52 F. (2d) 567.

Twachtman v. *Connelly,* (CCA-6) 106 F. (2d) 501.

To allow a party to raise after the evidence is closed an entirely new and unpleaded basis of recovery merely because evidence produced *and offered* (see plaintiff's opening made *after* the Boston depositions had been taken—R. 44, 79-87) on a separate ground alleged in the pleadings happened incidentally to furnish it some support, is directly contrary to the decisions of other circuits in the *Montgomery,* the *Garner,* the *Horvath,* and the *Carpenter* cases, supra.

Any other decision directly flouts Rule 8(c) and results in manifest injustice.*

*That there was evidence which, if believed, would completely meet the inferences drawn by the court from the Boston depositions as the factual support for its rulings was shown to the Circuit Court of Appeals by affidavits from the same witnesses themselves (R. 131-5).

We submit, therefore, that the petition for certiorari should be granted.

Respectfully submitted,

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